Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	))))	GN Docket No. 12-268

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

Mako Communications, LLC ("Mako"), licensee of numerous Low Power Television ("LPTV") stations, petitions for reconsideration of the Commission's *Report and Order in GN Docket No. 12-26, Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567 (2014) ("Report and Order"). The *Report and Order* impermissibly effectively revokes LPTV broadcast licenses by rulemaking. The Communications Act of 1934, as amended (the "Communications Act"), and the Administrative Procedure Act (the "APA"), however, provide station licenses can only be revoked after individual adjudicatory proceedings in which the licensee has notice and an opportunity for a hearing.

Neither Congress' reservation of LPTV rights in the Middle Class Tax Relief and Jobs Creation Act of 2012 (the "Spectrum Act"), nor the deficit-reduction goals of that Act excuse the *Report and Order's* wholesale revocation of LPTV stations' license rights. LPTV station licensees are entitled to due process of administrative law. Such licensees' rights can only be revoked upon those grounds specified in Section 312 of the Communications Act, and no evidence has been adduced on this record warranting commencement of such revocation proceedings. Congress never intended the Spectrum Act to support the *en masse* revocation of station licenses by rulemaking. To the contrary, Congress specifically protected and preserved LPTV rights in the Spectrum Act, because such rights are not secondary to every conceivable spectrum use, including the broadband use at issue in this proceeding. That reservation thus establishes Congress never intended the Spectrum Act to overturn administrative due process protections it enshrined in the Communications Act and the APA decades ago.

On reconsideration, the Commission must exclude LPTV spectrum rights from the *Report and Order*'s purview, or include such broadcast rights in the reverse and forward auction procedures now only offered by the Commission to full power and Class A licensees. The *Report and Order* must otherwise fail, because expropriation of LPTV broadcast rights is a pivotal part of the *Report and Order's* attempt to extract spectrum and money from such lawfully-issued and held licenses. Contrary to the Commission's conclusion, LPTV is not secondary to any and every other type of spectrum use. Rather, its secondary status is expressly limited by the Spectrum Act.

The Commission anticipated its new rules would impose disastrous consequences for LPTV stations. In its *Report and Order*, it promised to adopt an entirely new rulemaking notice, at some unspecified future time, to address the wholly undesirable consequences the *Report and Order* would admittedly visit upon LPTV licensees; however, no such promised rulemaking can remedy the damage the Commission's *Report and Order* will cause LPTV licensees. To help mitigate some such damage LPTV licensees will inevitably suffer, however, if the Commission does not release its promised remedial Notice of Proposed Rulemaking promptly, Mako will seriously consider filing a Petition for Rulemaking addressing such concerns.

The *Report and Order* suffers an additional procedural defect the Commission must remedy before any rules can be adopted legally-- it has failed to follow required environmental assessment findings under the National Environmental Policy Act ("NEPA"). No Commission exemption or other dispensation excuses the Commission's total failure to follow NEPA.

The Commission must therefore reconsider its revocation of LPTV stations' rights *en masse,* and comply with NEPA. It must act before any attempt to expropriate LPTV station licenses in its planned auctions and its related reorganization of television bands.

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PETITION FOR RECONSIDERATION

Mako Communications, LLC ("Mako"), by counsel, hereby seeks reconsideration of the *Report and Order in GN Docket No. 12-268, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*.[1] Mako timely filed Comments in the rulemaking proceeding.[2] It now challenges Commission conclusions contained in the *Report and Order,* which constitute material error. In support of its position, Mako submits the following:

I. BACKGROUND

The Commission initiated this proceeding by its issuance of a Notice of Proposed Rulemaking on November 21, 2012.[3] The *NPRM* explained the proceeding was necessary to comply with the directive of Congress in the Middle Class Tax Relief and Jobs Creation Act of 2012,[4] which authorized the Commission to conduct a spectrum incentive auction to reclaim television UHF band spectrum for broadband use. The *NPRM* generally presented procedures for acquiring television spectrum from broadcasters through a "reverse auction" for the subsequent

[1] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) ("Report and Order"). The *Report and Order* was published in the Federal Register on August 15, 2014, 79 Fed. Reg. 48442.
[2] Comments of Mako Communications, LLC, filed January 25, 2013 ("Comments of Mako").
[3] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd 14904 (2012) ("NPRM"). The *NPRM* was published in the Federal Register on November 21, 2012. 77 Fed. Reg. 69934.
[4] Pub. L. No. 112-96, §§ 6402 and 6403, 125 Stat. 156 (2012) ("Spectrum Act").

"forward auction" resale to broadband users based on reorganization or "repacking"[5] of the broadcasting television bands to free part of the UHF band for the "forward auction." Numerous broadcasters, including Mako, filed comments in the rulemaking contesting the *NPRM*. Mako specifically argued the proposed rule violated Congress's reservation of LPTV rights in Section 6403(b)(5) of the Spectrum Act, by subordinating LPTV rights virtually to all other uses of the spectrum.[6]

In its *Report and Order*, the Commission rejected Mako's arguments. It simply quoted with approval an excerpt from Comments filed by another party opposing Mako's position.[7] It promised, however, to conduct a future rulemaking proceeding to ameliorate the acknowledged adverse effects on LPTV licensees.[8]

Two Commissioners dissented vigorously from the three-Commissioner majority. Commissioner Ajit Pai expressed concern about the majority's failure to consider LPTV interests by noting, "[b]ecause the incentive auction will change [the] allotment scheme for full-power stations *without regard* to the Commission's fair distribution policies, it only makes sense to take the relatively minor step of providing a preference for displacement applications filed by low power television stations...that would provide a community with its only local, over-the-air television service."[9] Commissioner O'Rielly questioned the Commission's decision to defer important decisions until a subsequent time.[10]

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[5] "Repacking" involves reorganizing broadcast television bands so that those stations that remain on the air following the broadcast television spectrum incentive auction will occupy a smaller portion of the UHF band, thereby, allowing the Commission to reconfigure a portion of the UHF band for broadband use.
[6] Comments of Mako at 4-5.
[7] *Report and Order* at para. 289 and note 741.
[8] *Id.* at paras. 237, 664-666.
[9] *Id.*, Dissenting Statement of Commissioner Ajit Pai, note 12 (emphasis in original).
[10] *Id.*, Dissenting Statement of Commissioner Michael O'Rielly.

II. ARGUMENT

A. The Commission *Report and Order* Violates the Communications Act of 1934, as Amended, as Well as the Administrative Procedure Act by Seeking to Engineer the Revocation of LPTV Licenses *En Masse*.

The *Report and Order* would revoke existing LPTV licenses *en masse*, without providing any adjudicatory notice and hearing, and without a scintilla of evidence supporting such revocation. That *en masse* revocation by rulemaking squarely violates the adjudicatory notice and hearing requirements contained in the Communications Act of 1934, as amended (the "Communications Act") and the Administrative Procedure Act (the "APA").

1. The Commission Can Only Revoke Licenses For Actions Violative of Section 312(a) of the Communications Act.

Section 312(c) of the Communications Act provides the only lawful bases for revocation of outstanding station licenses issued by the Commission. It provides licenses can only be revoked for those actions specified in Section 312(a)[11] after the following administrative due process:

> Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist

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[11] Section 312(a) of the Communications Act, 47 U.S.C. § 312(a), specifies the following:

"The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing or waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefore and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.[12]

2. The Commission Must Follow Administrative Due Process Requirements in Revoking Licenses.

Congress further specified, in Section 312(d) of the Communications Act, the burden of proof and persuasion in revocation proceedings would rest upon the Commission.[13] The Act embedded its adjudicatory safeguards in Section 312 by specifically incorporating Section 9(b) of the APA,[14] 5 U.S.C. § 558(c). Section 312(e) declares "[t]he provisions of Section 558(c) of Title 5 [shall] apply with respect to the institution of any proceeding for the revocation of a license or permit..."[15]

Section 558(c) of Title 5, in turn, provides, in applicable part:

> "[e]xcept in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
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> (2) opportunity to demonstrate or achieve compliance with all lawful requirements."

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[12] Section 312(c) of the Communications Act, 47 U.S.C. § 312(c).
[13] Section 312(d) of the Communications Act, 47 U.S.C. § 312(d).
[14] APA, Section 9(b).
[15] Section 312(e) of the Communications Act, 47 U.S.C. § 312 (e).

The United States Court of Appeals for the District of Columbia Circuit specifically applied 5 U.S.C. § 558(c) in *Miami MDS Co. v. FCC,*[16] and explained the section conditioned "an agency's 'withdrawal, suspension, revocation, or annulment' of a license on its provision of notice and an opportunity to be heard."[17]

The Commission has never before attempted an *en masse* revocation of an untold amount of FCC licenses by rulemaking, and the FCC's seeming nonchalance here in terminating the LPTV industry hardly establishes such a mass revocation of licenses is lawful.[18] The Commission may not ignore the express language of its promulgating statute merely because it serves its present purposes.

3. Congress Embedded LPTV Licensees' Protection in the Spectrum Act Consistent with Administrative Due Process Requirements Contained in the Communications Act of 1934, as Amended, and the Administrative Procedure Act.

Congress reinforced existing Communications Act and APA due process safeguards by including Section 6403(b)(5) of the Spectrum Act.[19] That section reads "(5) LOW-POWER TELEVISION USAGE RIGHTS. Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations." As Mako explained in its comments "[a]ccording to the Commission, low power television stations have no rights when it comes to reconfiguration of the spectrum for broadband because low power television stations are

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[16] 14 F.3d 658 (D.C. Cir. 1994).
[17] *Id. at* 659.
[18] To be sure, previously, Courts have permitted the Commission to enact rules which forced licensees to divest stations without an evidentiary hearing to achieve compliance with FCC adopted rules. *See e.g. Citizens Committee for Broadcasting v. FCC,* 555 F.2d 938 (D.C. Cir. 1977), *rev'd in part on other ground,* 436 U.S. 775 (1978). However, as the Court noted, divestiture is not nearly as harsh as denial of license renewal. "A licensee facing divestiture is compensated for its loss. A licensee that fails of renewal [or incurs revocation by a Commission rulemaking] is not." *Id.* at 950. Revocation is a more serious sanction than even non-renewal, since revocation occurs during the middle of an already authorized station license period and cancels an existing authorization. Thus, if the Commission determines not to renew an application or to revoke a station's license, it has not and cannot reach those decisions without providing the licensee an opportunity to meet its charges at a hearing. Due process and the statute call for nothing less.
[19] 126 Stat. 227.

provided only secondary interference protection status and must resolve any interference which they cause, including going off the air if necessary...."[20] Mako noted, however "[t]he concept of 'secondary spectrum priority' does not mean that low power television stations can be wiped out any time for any reason to advance any service."[21]

The Commission disagreed with Mako. It said LPTV was secondary to virtually every primary service in the universe, whether preexisting, existing in the *Report and Order* or occurring in the future. It saw Section 6403(b)(5) as an affirmation of its view that, on a ranking of relative importance, LPTV service, in effect, was lower than any conceivable prior, present, or future primary service.[22] It concluded the purpose of Section 6403(b)(5) was to clarify the meaning and scope of Section 6403 and, "it does not limit the Commission's spectrum management authority."[23] The Commission's interpretation of Section 6403(b)(5) of the Spectrum Act would render that section a nullity.

According to the Commission, it is widely understood and accepted that LPTV stations are secondary to every primary service which has existed, exists, and may exist, including services no one has yet envisioned. If so, why did Congress expressly provide the Spectrum Act should be construed not to "alter the spectrum usage rights" of LPTV stations? If the Commission is correct that LPTV stations have never held any spectrum usage rights for any primary service, and if Section 6403(b) does not expand any spectrum usage rights to LPTV stations, what is the purpose of Section 6403(b)(5)?

According to the Commission, LPTV stations already lack spectrum usage rights against all primary services, including those covered in earlier Commission decisions, and those covered

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[20] Comments of Mako at p. 3 (footnote omitted).
[21] *Id.* at p. 4.
[22] *Report and Order* at paras. 236, 239.
[23] *Id.* at para. 239.

in the current *Report and Order* and in future Commission actions. The Commission concluded that under Section 6403(b)(2) of the Spectrum Act, LPTV stations are not entitled to any protections,[24] and there is nothing in the remainder of Section 6403(b) to suggest LPTV spectrum rights should otherwise be expanded.

If LPTV spectrum usage rights cannot be further limited vis-à-vis primary stations (since the FCC maintains LPTV already held no such rights) and LPTV rights cannot be expanded, then Section 6403(b)(5) serves no purpose.

For rights to be "altered," they must either be expanded or further limited, yet neither result obtains under the Commission's reading of Section 6403(b)(5). That reading would render this provision a complete waste without meaning or purpose. Such a reading affronts the "...axiom of statutory construction that whenever possible each word in a statutory provision is to be given meaning and not to be treated as surplusage...." [25]

Mako's interpretation of Section 6403(b)(5) gives that section of the Spectrum Act meaning -- that Section 6403(b)(5) is meant to maintain LPTV's secondary rights against those specific services discussed in earlier Commission actions. That Section does not further limit LPTV spectrum usage rights against services involved in implementation of the Spectrum Act.

The definition of "alter," the term used in Section 6403(b)(5) of the Spectrum Act, is "to change" or "to make different."[26] Before the *Report and Order*, no Commission decision concluded broadband was a priority service to LPTV.[27] Under the *Report and Order*, that will

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[24] *Report and Order* at para. 238.

[25] *Ki Se Lee v. Ashcroft,* 368 F.3d 218, 223 (3rd. Cir. 2004), *citing Acceptance Ins. Co. v. Sloan,* 263 F.3d 278, 283 (3d Cir. 2001). The Supreme Court several times has noted its approval of the doctrine that legislative enactments should not be construed to render these provisions mere surplusage. *See Dunn v. Commodity Futures Trading Commission,* 519 U.S. 465 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 987 (1995).

[26] http://dictionary.reference.com/browse/alter.

[27] The Commission's portrayal of the LPTV service as being secondary to "other primary services" (*Report and Order* at para 239 and note 741), is belied by the history of LPTV. Contrary to the statement of T-Mobile USA, Inc.,

change.[28] No one can reasonably argue such treatment does not constitute a change in the spectrum usage rights of LPTV stations.

As a result of this change, for the first time, the entire LPTV industry will be subject to losing their station licenses. The Commission *Report and Order* does not seriously contend otherwise. LPTV spectrum usage rights are clearly being altered by the *Report and Order*, and the altering of those spectrum usage rights violates the express language of Section 6403(b)(5) of the Spectrum Act.

The Commission also sought comment in the *NPRM* proceeding on its view that the interference protection ordinarily accorded to LPTV stations against modifications of Class A facilities under Section 336(f)(7)(B) of the Communications Act does not apply to channel assignments made in the repacking process.[29] The Commission offered an interpretation that the Congressionally-mandated requirement applied only to changes in Class A facilities proposed by

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which the Commission cites with approval, the Commission did not make "clear more than three decades ago that secondary, low-power television stations may not cause interference to and must receive interference from full-power television stations, certain land mobile radio operations and other primary services." *Id.* at para. 239.

To the contrary, "from its creation in 1982, the low-power television service has been a 'secondary spectrum priority service…[to] existing full-service [TV] stations or to new full-service stations when interference occurs.'" *Establishment of Class A Television Service (Reconsideration)*, 16 FCC Rcd 8244, 8245 (2001) *quoting Report and Order in BC Docket No. 78-253*, 51 R.R. 2d 476, 486 (1982). As noted in Mako's Comments (Comments of Mako at pp. 4-5), this concept is and has been embodied throughout the past 30 years in Section 74.702(b) of the rules, 47 C.F.R. § 74.702(b). *See also Turner Broadcasting System, Inc. v. FCC*, 819 F.2d Supp. 32 (D.D.C. 1993) [remainder of citation deleted]. (LPTV stations "are licensed on a secondary basis [and] they cannot interfere with the signals of any full power station…") The Commission has concluded in *Reallocation and Service Rules for 698-746 MHz Spectrum (Channels 52-69),* Report and Order, 17 FCC Rcd 1022, 1034-35 (2002) and *Advanced Television Systems and Their Impact on the Existing Television Broadcast Services*, Sixth Report and Order, 12 FCC Rcd 14588, 14652-53 (1997), that LPTV should not interfere with new licenses operating on certain specified UHF channels. However, these cases did not go beyond the specific channels discussed, the cases were never appealed by any LPTV licensee and the decisions' impact on LPTV was marginal.

The Commission also cites *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low-Power Television, Television Translators and Television Booster Stations and to Amend the Rules for Digital Class A Television Stations*, Report and Order, 19 FCC Rcd 19331, 19333 (2004), where the FCC did state that LPTV stations "may not cause interference to, and must accept interference from, full-service television stations, including land mobile radio operations and other primary services." However, the citation to "other primary services" is *dictum.* The Commission engages in gamesmanship when it plants unnecessary language in an action, then, a few years later, cites that language to support its position in a subsequent case.

[28] *Report and Order*, para. 656 and note 1824.

[29] Section 336(f)(7)(B), 47 U.S.C. § 336(f)(7)(B) prevents the Commission from approving a proposed modification of a Class A license unless certain showings are made.

licensees, not to limit what the Commission referred to as the "unanticipated" changes resulting from the broadcast television spectrum auction required in the Spectrum Act.[30]

In its *Report and Order*, the Commission adopts its *NPRM* conclusions not to extend interference protection to LPTV stations vis-à-vis Class A television station modifications in repacking. The Commission justified its interpretation by claiming the broadcast television spectrum incentive auction and repacking were "unanticipated" when Section 336(f)(7)(B) was enacted.[31] The Commission decision to ignore Section 336(f)(7)(B) of the Communications Act cannot be upheld merely because the Commission claims it failed to "anticipate" a broadcast television incentive auction would be held at some future point. The Commission cannot cite any statement in the Spectrum Act, or anywhere else, affirming its interpretation of Section 336(f)(7)(B).

The Commission's attempt to interpret language as required to justify its immediate needs is extraordinary, but unsupportable and thus unlawful. For example, it concluded its previous decisions treating LPTV stations as secondary to the services there discussed were meant to "anticipate" the future, and to apply to current Commission action treating LPTV as secondary to the Commission's confiscation of UHF spectrum for broadband use, contrary to the express language in the Spectrum Act. The Commission thus chose to misinterpret that section of the Spectrum Act to render it meaningless, and to argue effectively the definition of the word "alter" depends upon whether that definition furthers the Commission's plans to increase broadband.

The Commission also claims that because it did not "anticipate" a broadcast television spectrum auction, it can choose to redefine Section 336(f)(7)(B) a nullity. The Commission's

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[30] *NPRM*, 27 FCC Rcd at 12399 and note 732.
[31] *Report and Order* at para.244.

conclusions are, however, self-fulfilling. If condoned, the Commission's elastic, post-hoc reinterpretation to foster its view of the greater good, like the spectrum incentive auction and repacking, can eviscerate any statute and any Congressional intent.

The record in the rulemaking proceeding is devoid of any suggestion that the LPTV industry was somehow in violation of any law or Commission regulation or had violated the public interest, thereby bringing this on itself. There is no basis for revocation under Section 312 of the Communications Act.

The Commission's belated recognition of the wholesale decimation its new rule would visit upon the LPTV industry,[32] is no fix for the absence of any violation of law or Commission regulation to justify revocation under Section 312 of the Communications Act. Its promised remedial rulemaking sometime in the future to mitigate the LPTV industry's impending damages only proves the incentive auction and repacking will irreparably harm LPTV and TV translator stations."[33]

B. The Commission *Report and Order* Fails to Comply with the National Environmental Policy Act.

1. The National Environmental Policy Act Applies to the Commission.

The National Environmental Policy Act of 1969 ("NEPA") was enacted to ensure that all Federal agencies under Congressional authority (including the Commission) follow NEPA's substantive and procedural mandates to determine whether a covered action requires a

[32] *Id.* at para. 237 (The Commission acknowledges that, as a result of its decision, LPTV viewers will lose "the service of these stations.")

[33] *Report and Order, Appendix B, Final Regulatory Flexibility Analyses*, para. 9. *See also* Note 7, *infra.* If the Commission fails timely to honor its commitment to initiate a rulemaking quickly, Mako intends to file its own Notice of Proposed Rulemaking; however, such remedial action can never make LPTV whole.

"Categorical Exclusion," an "Environmental Assessment" with a "Finding of No Significant Impact" or a full "Environmental Impact Statement."[34]

After taking a "hard look at the environmental consequences of their actions…", an agency must prepare an "Environmental Assessment" to determine whether an action will be significant.[35] If the agency determines the action will not be significant, it may issue a "Finding of No Significant Impact" ("FONSI"), "accompanied by a convincing statement of reasons to explain why a project's impacts are insignificant" in lieu of preparing a full Environmental Impact Statement.[36]

2. The National Environmental Policy Act Applies to the Commission's Rulemakings.

Congress allowed Federal agencies like the Commission to exclude certain categories of actions from the foregoing assessment requirements.[37] For example, the Commission duly promulgated a "Categorical Exclusion" requirement at Section 1.1306 of its rules[38], and excluded some actions, such as antennae mounting and construction and certain site location, lighting and radiofrequency applications and modifications from its requirements.[39] The Commission has not promulgated any "Categorical Exclusion" for rulemaking proceedings like the matter at bar.

3. The Commission Rulemaking Proceeding Violated the National Environmental Policy Act.

Since the Commission has not excluded rulemaking proceedings like the instant matter, the *Report and Order* should have included an "Environmental Assessment" with a finding of "No Significant Impact," or prepared a full "Environmental Impact Statement" under Section

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[34] 42 USC §§ 4331, 4332, and 4332(C). *See also Northwest Coalition for Alternatives to Pesticides v. Lang,* 673 F.Supp. 1019 (D. Or. 1987), *aff'd* 844 F.2d 588 (9th Cir. 1988).
[35] *See Cascadia Wildlands v. U.S Forest Service,* 937 F.Supp.2d 1271, 1275 D. Or. 2013).
[36] *Id., citing Sierra Club v. Bosworth ("Sierra Club 1"),* 510 F.3d 1016, 1018 (9th Cir. 2007).
[37] *See* 42 USC § 4332.
[38] 47 CFR § 1.1306.
[39] *See* 47 C.F.R. § 1.1306(b).

1.1305 of the Commission's rules.[40] At no time in this proceeding has the Commission provided any such notice or finding required under its own rules.

Without an "Environmental Assessment," the Commission did not and could not issue a FONSI, the most minimal of environmental assessments mandated by NEPA. The Commission has, therefore, failed to comply with NEPA's most rudimentary, but mandatory requirements. As such, the Commission's *NPRM* and its rules promulgated in this rulemaking proceeding are invalid.[41]

Notably, neither Mako nor any other party in this proceeding is required to argue what manner of environmental effect the Spectrum Auction rules would precipitate. It was and remains the Commission's obligation properly to make that assessment in complying with NEPA's requirements. Unless and until the Commission achieves such NEPA compliance, any rules promulgated in the *Report and Order* are unlawful. "[D]ilatory or *ex post facto* environmental review cannot cure an initial failure to undertake environmental review."[42]

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[40] 47 C.F.R. § 1.1305.
[41] *See Natural Resources Defense Council, Inc. v. Berklund*, 458 F.Supp. 925 (1978) *aff'd.*, 609 F.2d 553 (1979).
[42] *Sierra Forrest Legacy v. Sherman,* 646 F.3d 1161, 1180 (9th Cir. 2011), *citing Pit River Tribe v. U.S. Forest Serv.,* 469 F.3d 768, 785 (9th Cir. 2006).

III. CONCLUSION

The *Report and Order* is procedurally and substantively defective. Substantively, it unlawfully revokes issued and outstanding LPTV licenses by rulemaking, in direct violation of statutory and administrative due process requirements and the clear protection afforded by Congress in the Spectrum Act. Procedurally, it violates the NEPA because of the Commission's failure to issue the required environmental notice. The Commission must, accordingly, reconsider its defective conclusions, and adopt rules consistent with the Communications Act and the APA and also issue a Supplemental NPRM or similar document in order to come into environmental compliance under NEPA.

September 12, 2014

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